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No. 82-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOUTHERN MOTOR CARRIERS
RATE CONFERENCE, INC.

and

NORTH CAROLINA MOTOR CARRIERS
ASSOCIATION, INC.

and

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit, Unit "B"

12 pp

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Petitioners Southern Motor Carriers Rate Conference, Inc., ("SMCRC"), North Carolina Motor Carriers Association, Inc. ("NCMCA"), and National Association of Regulatory Utility Commissioners ("NARUC"), in presenting the reasons why their petition for a writ of certiorari should be granted, stressed the crucial importance of this case to the regulation of the intrastate rates of motor common carriers by the several states. If left undisturbed, the decision below will require the

dismantling of regulatory schemes which have been in effect in most states for at least three decades. In addition, petitioners pointed out that in the decision below, the majority's use of a formulistic compulsion test to determine whether state action immunity exists led it to an untenable inference, namely, that Congress intended to preempt state law designed to effectuate in intrastate commerce the same policies that federal law is designed to effectuate in interstate commerce. The decision thus completely ignores the concern for federalism first expressed in the antitrust area forty years ago in *Parker* v. *Brown*.[1]

Respondent United States of America has failed to address these concerns in its brief in opposition to the petition. Rather than discussing the important issues which are relevant to a decision on a petition for writ of certiorari, the government has attempted to avoid the federalism issue in its entirety by mischaracterizing this case as another routine application of federal antitrust law. Indeed, the government's brief in opposition is in reality nothing more than an effort to disregard express conflicts which call for resolution by this Court. Failure to resolve these conflicts will result in immediate and unjustifiable interference on a wholesale basis with the regulatory systems of the several states. If anything, the government's strained attempts to distinguish these conflicts on the merits underscore the need for review in this Court.

ARGUMENT

I. State Action

In their petition, Petitioners established that the decision below, if left unreviewed, will have a devastating impact on the regulatory schemes of the five involved states and will establish a precedent for similar dismantling of the regulatory schemes of the other states represented by petitioner NARUC. In response, the government cavalierly suggests

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[1] 317 U.S. 341 (1943).

that "[i]f . . . rate agreements are essential to permit the states effectively to regulate motor carrier rates, the states are free to require such agreements. . . ." Brief of Resp. 16. There are, however, problems with this "solution."

First, as the government concedes: "Petitioners are correct in pointing out that there would presumably be less competition if the states did so, since some carriers now file individual rates." Brief of Resp. 16. Thus, the government is urging this Court to interpret the federal antitrust laws in such a manner that the result will be a lessening of competition within the several states.

Aside from the irony of the government's position, in response to this litigation the states have already adopted provisions in an effort to meet the stringent compulsion test of the District Court. In 1980, following the District Court decision below, the Tennessee legislature amended *Tenn. Code Ann.* § 65-1506 (Cum. Supp. 1981) to authorize its Public Service Commission to establish "collective rate-making procedures." The amendment provides that "all carriers party to [a collective ratemaking] agreement shall be required to comply with [the established] rate-making procedures." Also in 1980, the Georgia General Assembly amended *Ga. Code Ann.* § 68-613 (Cum. Supp. 1981) to require the Public Service Commission to "establish ratemaking procedures . . . which shall include . . . collective ratemaking procedures for the joint consideration, initiation, and establishment of such rates and charges." Amended § 68-613 provides that carriers are "required to comply with such ratemaking procedures." Neither of these compulsory provisions met the test adopted by the Court below.

In any event, it is inconceivable that Congress intended the antitrust laws to be applied in the manner suggested by the government. Only recently, Congress indicated that it was aware of the existing schemes under which the various state provisions relating to collective rate formulation parallel and complement the federal collective ratemaking provisions, and

it made a deliberate determination to maintain the status quo with respect to those schemes. In the legislative history of the Motor Carrier Act of 1980, there is a discussion of collective formulation of intrastate rates *without* specific authorization from the states involved. The following appears at page 29 of the House Report:

> In the bill as originally introduced, there was a provision which prohibited the rate bureaus from docketing or handling rates for intrastate transportation without specific authorization from the states involved. The Committee eliminated this section because it received very little evidence on that particular subject. The Committee intends to continue looking at this area, but for the time being, the status quo should apply with respect to intrastate ratemaking.

H.R. Rep. No. 1069, 96th Cong., 1st Sess. 29, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2283, 2311. This recent expression of Congressional intent that "the status quo should apply with respect to intrastate ratemaking" belies the government's contention that the antitrust laws should be interpreted to require the states to adopt anticompetitive compulsory collective ratemaking provisions.

Fundamental to the government's misdirected approach is the statement in its brief that Petitioners have conceded the *per se* unlawfulness of their conduct. Brief of Resp. 4. This is simply not the case and reflects a basic misunderstanding of the issues presented in the petition. Petitioners have maintained from the outset of this litigation that the conduct which is the subject of this lawsuit does not violate the Sherman Act since the state regulatory commissions, rather than Petitioners, in fact set motor carrier rates. The record in this case plainly establishes the active role of the state commissions in analyzing, reviewing and acting upon rate proposals submitted by Petitioners. App. D at 73a. Petitioners SMCRC and NCMCA have conceded for their own part only that they act collectively to formulate rate proposals to be submitted to the state commissions. The collective formulation of rate proposals is an integral part of the state regulatory processes.

Thus is established the basis for Petitioners' state action argument—an argument which does not rest on otherwise unlawful conduct which is exempted from the Sherman Act, but conduct which is not unlawful because it is not within the scope of the Sherman Act as explained in *Parker*. In other words, Petitioners do not seek the benefit of any exemption which undermines the integrity of the federal antitrust laws. Rather, Petitioners respectfully suggest that the conduct at issue here cannot constitute price fixing in light of the federalism limitations on the Sherman Act expressed in *Parker*. Therefore, it should be clear that Petitioners have made no concessions regarding the illegality of their conduct and in fact continue to deny vigorously any such contention.

Moreover, the government is patently ineffective in its attempt to distinguish *Parker* from the case before this Court. Brief of Resp. 14 n.9. The government admits that in the case *sub judice*, "[T]he state regulatory regimes permit carriers to *propose* rates in either a competitive or a collusive fashion. . . ."[2] It is undisputed that the state regulatory commissions may accept, reject or modify the rate proposals. Respondent further admits that in *Parker*, the state made the decision regarding anticompetitive conduct "at the behest of private parties,"[3] but suggest that the private initiative was "immaterial." On the contrary, the similarity between the cases is remarkable and thus the conclusion is inescapable that if the private initiative did not destroy state action in *Parker*, then the same result obtains here. Consequently, there is an unavoidable conflict between *Parker* and the holding of the Fifth Circuit, Unit "B," in this case.

Even more telling is the strained argument made by Respondent in an effort to distinguish this Court's holding in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*[4] First, the government again incorrectly restates Peti-

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[2] Brief of Resp. 14 n.9.

[3] *Id.*

[4] 445 U.S. 97 (1980).

tioners' position by characterizing the conduct at issue as collective rate agreements rather than rate proposals which are subject to state regulatory commission approval. Brief of Resp. 15. Utilizing this faulty premise, the government argues by way of counterpoint that *Midcal* involved a challenge to a state statute.[5] Then, the government asserts that where a unit of government seeks to invoke state action, compulsion is not necessary as long as there is "a clearly articulated and enforced state policy of regulation." Brief of Resp. 16. Indeed, recent cases dealing with units of government as defendants require only the existence of the first prong of *Midcal*—a clearly articulated and affirmatively expressed state policy—in order to invoke state action.[6] The Seventh Circuit, in *Town of Hallie* v. *City of Eau Claire*,[7] stated that active supervision is not required of government subdivisions in light of other enforcement mechanisms which ensure compliance with state policies. This position was echoed by the Eighth Circuit in *Gold Cross Ambulance and Transfer and Standby Service, Inc.* v. *City of Kansas City*,[8] which noted that "municipal officials generally are politically accountable to the citizens they represent" and thus not in need of state supervision. If, as the government contends, *Midcal* is limited in application to units of government and if, as *Hallie* and *Gold Cross* demonstrate, only the first prong of the *Midcal* test is necessary for state action to exist in such cases, the government fails to explain the purpose of the second prong of the *Midcal* test — active supervision by the state. The position taken by the Seventh and Eighth Circuits conflicts with the Fifth Circuit, Unit "B", as well as the position taken by the government in its Brief in Opposition.

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[5] Brief of Resp. 15. The implication that no state interest is at stake where a private party is the defendant is fallacious, as pointed out in the Petition. Pet. 14-15 and 15 n.33. Moreover, it ignores the reality of this case, as recognized by the District Court. Pet. App. 32a n.7.

[6] *E.g.*, *Town of Hallie* v. *City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983); *Gold Cross Ambulance and Transfer and Standby Service, Inc.* v. *City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983).

[7] 700 F.2d at 384.

[8] 705 F.2d at 1014.

Petitioners respectfully suggest that the active supervision requirement, as explained by the Seventh and Eighth Circuits,[9] must be directed at private parties carrying out clearly articulated and affirmatively expressed state policies. Such a position fairly explains the reference to and quotation of *Goldfarb* v. *Virginia State Bar*[10] and *Cantor* v. *Detroit Edison Co.*[11] in the *Midcal* opinion. Petitioners do not contend, as the government suggests, that *Midcal* is inconsistent with or a reconsideration of *Goldfarb* and *Cantor*. Indeed, the results in those two cases are unaltered by applying Petitioners' reading of *Midcal* to the respective facts. *Goldfarb* must be viewed as the first state action case handed down by this Court in the more than thirty years since *Parker* was decided. Since 1975, there have been a series of cases in which the state action doctrine has matured and evolved. Petitioners merely suggest that *Midcal* represents the Court's refinement of *Goldfarb* into a more flexible and practical test that allows the federal courts to better respond to the complexities of state regulation. The Eighth Circuit, in interpreting *Midcal*, has stated:

> [I]n its most recent case involving private conduct, the Supreme Court required, as prerequisite for *Parker* immunity, a state policy to displace competition and active state supervision rather than state compulsion of the challenged practice.[12]

The refusal of the Fifth Circuit, Unit "B", to recognize the evolution of the state action doctrine represents a direct conflict with the holding of this Court in *Midcal*, and with the interpretation of that opinion by the Eighth Circuit.[13]

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[9] 700 F.2d at 384; 705 F.2d at 1014.

[10] 421 U.S. 773 (1975).

[11] 428 U.S. 579 (1976).

[12] *Gold Cross Ambulance*, 705 F.2d 1005, 1012 n.11.

[13] This conflict between the Fifth Circuit, Unit "B", and the Eighth Circuit is in addition to the conflicts with the Seventh, Ninth and District of Columbia Circuits already discussed in the Petition.

Moreover, the pragmatic flexibility of *Midcal* has been recognized in the carefully reasoned and clearly stated decisions of the circuit courts which the government so casually seeks to dismiss as not being in conflict with the rigid interpretation of the state action doctrine adhered to by the Fifth Circuit, Unit "B", in the case *sub judice*. The cases speak for themselves and need no reiteration here to demonstrate the conflicts relied upon in the Petition. Pet. 15-17. However, it is worth noting that the government attempts to distinguish *Turf Paradise, Inc.* v. *Arizona Downs*[14] by observing that the private race track operators engaged in allocation of racing dates had no leeway since either they allocated the racing dates between themselves or the state would do so. But such a situation does not amount to absolute compulsion to violate federal antitrust laws, since the private parties could have opted to let the state handle the matter, thus at once complying with federal and state law.[15]

The government cites the case of *United States* v. *Title Insurance Rating Bureau, Inc.*,[16] apparently for the proposition that permissive legislation cannot provide the basis for a state action claim. It is important to note that *Title Insurance* involved solely a private defendant to whom the Ninth Circuit, without any mention of a compulsion prerequisite, did apply the two-prong *Midcal* test, thus reaffirming the conflict with the holding of the Fifth Circuit, Unit "B", here. The holding of the *Title Insurance* case—that there was no clearly articulated and affirmatively expressed state policy to displace competition—is hardly analogous here in light of a significantly different fact pattern highlighted by a clear legislative state-

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[14] 670 F.2d 813 (9th Cir., 1982), *cert. denied*, 456 U.S. 1011 (1982).

[15] This argument points up the absurdity of Respondent's literal compulsion requirement: "Moreover, as the court of appeals noted, where the decision to compete or not is left to the private party, it can comply with both the federal antitrust laws and state regulatory laws." Brief of Resp. 12.

[16] 700 F.2d 1247 (9th Cir. 1983) *cert. pending*, No. 83-154.

ment of neutrality as to competition in the title insurance industry.[17] Moreover, the ramifications of any factual distinctions are addressed more appropriately in a brief on the merits should the Court determine to grant a writ of certiorari.

II. Noerr-Pennington

The government is incorrect in its assertion that this Court would have to overrule *Georgia* v. *Pennsylvania R.R. Co.*[18] in order to uphold Petitioner's *Noerr-Pennington* claim. *Pennsylvania Railroad* is a procedural case which holds that the authority of a state to maintain a civil suit under federal antitrust laws extends to suits by it as *parens patriae* as well as to suits for the protection of its proprietary interest. The complaint alleged the Defendant had utilized unlawful means, including coercion, in furtherance of a conspiracy to discriminate against the plaintiff State of Georgia in freight rates. In dicta, the Court stated that such a conspiracy would be unlawful. The Court did not hold that all collective rate publication by the railroads, without more, was a *per se* violation of the Sherman Act.

Petitioners wholeheartedly agree with the government's assertion that the principal objective of *Noerr-Pennington* is to protect the flow of information to public officials. However, rather than limiting the flow of information as suggested by the government (Brief of Resp. 20 n.14), the collective formulation of rate proposals provides more comprehensive and accurate data to state regulatory commissions in a far more useful format than would be the case with hundreds of individual filings. Individual carriers lack the resources to provide the commissions with the extensive analysis now provided by Petitioners, thus hindering the decision-making process. The government fails to perceive that quality of information flow is at least as important as quantity. Indeed, the states have suggested that they would be virtually paralyzed in the face of hundreds of individual motor carrier rate filings.

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[17] *Id.* at 1253.

[18] 324 U.S. 439 (1945).

It is the drastic impact of this case on the states which to a large extent necessitates and justifies issuance of a writ of certiorari. The government has failed conspicuously to address this issue in its brief.

CONCLUSION

For all the reasons set forth herein, Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, Unit "B".

Respectfully submitted,

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